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"F" v. KETUA PENGARAH JABATAN PENDAFTARAN NEGARA

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD ZAIDI IBRAHIM J
[SUIT NO: WA-21NCVC-50-06-2016]
30 NOVEMBER 2023

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Abstract – *The stand/view of the courts pertaining to gender re-assignment is somewhat split between two schools, the traditional and progressive – the progressive, as the term denotes, recognises gender re-assignment, whereas the 'traditionalist' refuses to do so. Nevertheless, the determination of gender is not based on the biology of the XX chromosome and XY chromosome but a mix of biology, psychology and social aspects. Thus, in an application for a declaration for a change of gender and following thereto, for such changes to be effected in the National Registration Identity Card (NRIC), the applicant must fulfil the test stipulated by the court in Kristie Chan v. Ketua Pengarah Jabatan Pendaftaran Negara. It must also be shown that there was a mistake/error in respect of the particulars at the time when such document was issued by the Registration Department, failing which, such application would not be entertained by the courts.*

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CIVIL PROCEDURE: *Declaration – Application for – Plaintiff suffering from gender dysphoria and underwent sex re-assignment surgeries from female to male – Application for declaration that plaintiff legally male and to amend National Registration Identity Card ('NRIC') – Whether determination of gender involves biological, psychological and social aspects – Whether plaintiff satisfied test in Kristie Chan v. Ketua Pengarah Jabatan Pendaftaran Negara – Whether changes in NRIC could only be effected upon proof of mistake or error of particulars at time document issued – Whether plaintiff established mistake or error occasioned for amendments in NRIC to be allowed – Births and Deaths Registration Act 1957, s. 27(3)*

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CIVIL PROCEDURE: *Res judicata – Issues raised – Application for declaration that plaintiff legally male and to amend NRIC – Whether same facts and same/identical reliefs claimed in earlier proceedings – Whether issues considered, determined and disposed of by court on merits – Whether all facts and evidence scrutinised and considered thoroughly – Whether present suit caught by res judicata – Courts of Judicature Act 1964, para. 11 of Schedule*

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The plaintiff, born a female in 1987, claimed to suffer from gender dysphoria ('GD') since young. Between the years 2011 to 2013 she underwent a series of sex re-assignment surgeries ('SRS') in Thailand to change her gender from female to male. Having completed the SRS, she then applied to the

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defendant, Ketua Pengarah Jabatan Pendaftaran Negara, for a new National Registration Identity Card ('NRIC') or, alternatively, for her current NRIC to be amended to reflect her gender as a male. The defendant rejected the application. Dissatisfied, she applied for a judicial review to challenge the defendant's decision but, her application was dismissed by the High Court ('HC'). Her appeals to the Court of Appeal and the Federal Court against the decision of the HC were also unsuccessful. The plaintiff thus commenced this suit, seeking: (i) a declaration that the plaintiff was legally a male; (ii) an order of *mandamus* for the defendant to amend the plaintiff's name in the NRIC to 'Kelven Fau'; and (iii) an order of *mandamus* for the defendant to make the necessary amendment to the details of the plaintiff's gender from 'female' to 'male' including to change the last digit in the plaintiff's NRIC from 'an even number' to 'an odd number' for the purpose of identifying the plaintiff as a male. The plaintiff also pleaded that, by the SRS, her gender had been successfully changed from female to male and thus entitling her to the reliefs claimed. The issues that arose for the court's determination were: (i) whether the plaintiff's claim was caught by *res judicata* and a multiplicity of action; (ii) whether the plaintiff is to be treated as a 'male' under the law; and (iii) whether the plaintiff's application to change the status of her gender in her NRIC from 'female' to 'male' ought to be allowed.

Held (dismissing plaintiff's claim):

(1) The plaintiff had filed two actions in the court based on the same facts and prayed for the same/identical reliefs, one of which had been duly considered, determined and disposed of by the court on its merit. The judge had scrutinised and considered thoroughly the medical reports of the plaintiff's experts, including the facts deposed and adduced *via* the plaintiff's affidavits. Hence, this suit, which was premised on the same facts and evidence, which had been considered and determined by the court previously, was caught by *res judicata*, for which it could be dismissed pursuant para. 11 of the Schedule to the Courts of Judicature Act 1964. (paras 35, 39 & 40)

(2) GD is a recognised medical condition, and that SRS is one of the legitimate medical procedures to treat it. There was no dispute that the plaintiff suffered from GD and underwent SRS in Thailand. Nevertheless, gender was not just based on the biology of the XX chromosome and XY chromosome but a mix of factors of biology, psychology and social aspects. Bearing in mind, chromosomal factor is one of the crucial and determining factors, the plaintiff had failed to show that chromosomal factor/criterium had been fulfilled as required.

A The plaintiff failed to comply with the test as stipulated in *Kristie Chan v. Ketua Pengarah Jabatan Pendaftaran Negara*, which endorsed the decision in *Bellinger v. Bellinger* and *Corbett v. Corbett*. (paras 57 & 69)

(3) All matters concerning the documents for registration of identity (certificate of birth and NRIC) of a person is governed under the B provision of the National Registration Act 1959 and the Births and Deaths Registration Act 1957 ('Act') and the Regulations enacted thereunder. Any alteration, correction or amendment to the content in the NRIC could only be made under reg. 14 of National Registration Regulations 1990. Correction/amendment to the NRIC can only be C made upon proof that there occasioned a mistake/error in respect of the particulars at the time when such document was issued by the Registration Department. The application to correct/amend her NRIC was made after her SRS and not due to mistake/error in her birth certificate or her NRIC. Section 27(3) of the Act excludes the reliefs D sought by the plaintiff. In the circumstances of this case, the court was not empowered to overstretch its judicial power to change particulars pertaining to gender, name and the numerical digits of the NRIC. (paras 73-75 & 77)

Case(s) referred to:

E *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC* ***(refd)***
Attorney-General for the Commonwealth v. Kevin & Others [2003] Fam CA 94 ***(refd)***
Bellinger v. Bellinger [2003] UKHL 21 ***(foll)***
Corbett v. Corbett [1970] 2 All ER 33 ***(foll)***
Fau En Ji v. Ketua Pengarah Jabatan Pendaftaran Negara [2015] 1 CLJ 803 HC ***(refd)***
Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors [1996] 3 CLJ 695 HC ***(refd)***
F *J-G v. Ketua Pengarah Jabatan Pendaftaran Negara [2005] 4 CLJ 710 HC* ***(refd)***
Kristie Chan v. Ketua Pengarah Jabatan Pendaftaran Negara [2013] 4 CLJ 627 CA ***(foll)***
Penang Port Commission v. Kanawagi Seperumaniam [2009] 1 CLJ 169 CA ***(refd)***
Pilecon Engineering Bhd v. Malayan Banking Bhd & Ors [2011] CLJU 1492; [2011] 1 LNS 1492 HC ***(refd)***
G *Scott & English (M) Sdn Bhd v. Yung Chen Wood Industries Sdn Bhd [2018] 6 CLJ 271 FC* ***(refd)***
Syarikat Sebati Sdn Bhd v. Pengarah Jabatan Perhutanan & Anor [2019] 3 CLJ 157 FC ***(refd)***
Tan Pooi Yee v. Ketua Pengarah Jabatan Pendaftaran Negara [2016] 8 CLJ 427 HC ***(refd)***
Wong Chiou Yong v. Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara [2005] 1 CLJ 622 HC ***(refd)***

H **Legislation referred to:**
Births and Deaths Registration Act 1957, s. 27(3)
National Registration Regulations 1990, reg. 14

For the plaintiff - JT Chong; M/s JT Chong Assocs
For the defendant - Maisarah Othman; SFC

I *Reported by S Barathi*

JUDGMENT

Ahmad Zaidi Ibrahim J:

Introduction

[1] To start with, pursuant to this court's order dated 28 September 2016 by Roslan bin A Bakar JC (as His Lordship then was) for encl. 10, to preserve the plaintiff's anonymity, the plaintiff shall hereinafter be referred to as "F" or as "the plaintiff".

Brief Background

[2] The plaintiff ("F") was born a female in 1989. She claimed to suffer from Gender Dysphoria (GD) since she was young. Between the years 2011 and 2013 she underwent a series of sex re-assignment surgeries (SRS) in Thailand to change her gender from female to male. Having completed the SRS, she then applied to the defendant (Ketua Pengarah Jabatan Pendaftaran Negara), for a new National Registration Identity Card (NRIC) or alternatively, for her current NRIC be amended to reflect her gender as male. The defendant rejected her said application. Dissatisfied, she applied to the High Court (HC) for a judicial review to challenge the defendant's said decision. The HC dismissed her said application. Her follow-up appeals to the Court of Appeal (COA) and the Federal Court (FC) against the decision of the HC were also unsuccessful. Having failed to secure leave to appeal from the FC, she then commenced this suit, seeking in para. 15 of her statement of claim (SOC) the following reliefs:

(i) a declaration that the plaintiff is legally a male.

(ii) an order of *mandamus* that the defendant makes an amendment to the plaintiff's name in the National Registration Identity Card Number (NRIC) to "Kelven Fau".

(iii) an order of *mandamus* that the defendant makes a necessary amendment to the details of the plaintiff's gender from "female" to "male" including to change the last digit in the plaintiff's NRIC from "an even number" to "an odd number" for the purpose of identifying the plaintiff as a male.

(iv) no order as to costs.

[3] In her SOC and reply to the defendant's statement of defence, the plaintiff pleaded that the SRS had succeeded in changing her gender from female to male and thus entitling her to the reliefs above mentioned.

[4] The defendant disputed the plaintiff's abovesaid claim. Briefly, in the statement of defence (SOD), the defendant pleaded the following:

(i) that the plaintiff's claim is caught by the doctrine of *res judicata* and a duplicity of action;

(ii) that the reliefs sought are premature in nature;

(iii) that the plaintiff's application to amend her NRIC relating to her gender and name was not made in accordance with the National Registration Regulations 1990 (Peraturan-Peraturan Pendaftaran Negara 1990) and thus, was correctly rejected by the defendant; and

(iv) on merit, the defendant disputes the plaintiff's claim that she is now legally a male.

[5] In her reply to the statement of defence, the plaintiff denied that her claim herein is caught by *res judicata* or is a duplicity of action.

Decision Of The Court After Trial

[6] After having appraised wholly the evidence adduced and having considered the submissions by learned counsel for both sides, based on the findings and grounds to be narrated hereinafter, I find that the plaintiff had, on the balance of probability, failed to prove her claim. Thus, the plaintiff's claim is dismissed with costs of RM10,000 to the defendant.

[7] To put it briefly, 1 find that the plaintiff's claim herein is caught by *res judicata*. On merits, l find that the plaintiff failed to prove that she is now legally a male despite the SRS surgeries.

Chronology Of Events

[8] The undisputed material facts and events are as follows:

(i) the plaintiff was born a female on 26 October 1989 as stated in her Birth Registration No. 11099420 No. (birth certificate/BC);

(ii) on 26 January 2001, at 12 years of age the plaintiff was issued with her NRIC. Subsequently, at 18 years old in age, she was issued a replacement/new NRIC by the defendant. In both the aforementioned NRICs, her sex status is certified as female, based on information given by the father;

(iii) sometimes in 2012, she underwent sex re-assignment surgeries (SRS) in Thailand, to change her gender from "female" to "male";

(iv) after the SRS, *vide* letter dated 18 August 2013, she applied to Jabatan Pendaftaran Negara (defendant) for a new NRlC or alternatively, for her current NRIC be amended to indicate her gender as "male" and for her name be changed to "Kelven Fau". However, her application was refused by the defendant *vide* letter dated 29 August 2013;

(v) dissatisfied over the defendant's rejection, she applied to the Kuala Lumpur High Court (HC) *vide* Originating Summons No. 25-203-10/ 2013 (OS 203) for judicial review to challenge the defendant's said decision. The HC dismissed her said application;

(vi) aggrieved, she appealed to the Court of Appeal (COA). However, the COA dismissed her appeal;

(vii) she then sought for leave to appeal further to the Federal Court (FC). Again, her attempt was fruitless as the FC refused to grant her leave; and

(viii) flowing from there, she commenced the suit herein.

Background Fact

The Plaintiff's Case

[9] The plaintiff called four witnesses. They are:

(i) PW1 - the plaintiff herself;

(ii) PW2 - Lau Hui Li, the plaintiff's female girlfriend and live-in partner;

(iii) PW3 - Dato' Dr Selvalingam Sothilingam (Dr Selvalingam), Consultant Urologist; and

(iv) PW4 - Dr Barathi Vengadasalam (Dr Barathi), Consultant Psychiatrist.

[10] The material facts adduced through the witnesses above mentioned can be summarised as follows: The plaintiff (PW1), was born a female on 12 October 1989 in Penang as stated in her BC and NRIC. The plaintiff claimed that she suffered from "Gender Identity Disorder/Gender Dysphoria (GD)" since young. She felt like a male trapped inside the body of a female and ever since her school-going days, her life, appearance and behaviour is that of a male.

[11] *Circa* 2009, she started taking male hormones, as prescribed by her doctor, Dr Edward Chan (Dr Chan). About a year thereafter, Dr Chan opined that she was ready for sex re-assignment surgery (SRS) and recommended her Yanhee International Hospital, Bangkok, Thailand (YIH).

[12] In 2011 she went to YIH. There, she was seen by Dr Ajcara Roumcharoenkiat, a psychiatrist. Dr Ajcara diagnosed her of suffering from GD and viewed that she was suited to undergo SRS.

[13] Thereafter, she underwent the following surgeries on the following dates:

(i) 16 February 2011 – a "mastectomy" performed by Dr Thawatchai Boopadhanapong and a "TAH-BSO/Transabdominal Hysterectomy with Bilateral Salpingo-oophorectomy" by one Dr Amnart Techowanich (the first stage);

(ii) 5 February 2012 to 11 February 2012 - a surgery to totally close her vaginal canal and to reconstruct a uterus and urethra (the second stage); and

(iii) 15 December 2012 to 28 December 2012 - a surgery to construct a male sex organ by Dr Sukit Worathamrong (the third stage). Briefly, the third stage involved the construction of a penis, the scrotum, nerves for sensation and the urethra.

[14] Upon her return home after the SRS, she was further examined by Dr Wong Kok Kien (Dr Wong) and Dr Kenneth Koh (Dr Koh) from Gleneagles Hospital, Kuala Lumpur and thereafter by Dato' Dr Selvalingam (PW3) and Dr Barathi (PW4) of Pantai Hospital, Kuala Lumpur. They all confirmed that the plaintiff's SRS were successful.

[15] Thereafter, *vide* her letter to the defendant dated 19 August 2013, the plaintiff applied for a new NRIC that identifies her as male or alternatively, for the defendant to amend her current NRIC pertaining to her gender from "female" to "male". In addition, she also applied for her name to be changed to "Kelven Fau". Alas, *vide* letter dated 2 September 2013, the defendant rejected her said request.

[16] According to the plaintiff although identified as a "female", her lifestyle, appearance (dress preference) and behaviour are that of a male. She has no sexual interest/desire towards any male. She now works as an IT Consultant and everyone at her workplace accepted her as a male, including her employer and clients. She is also in a relationship with her current live-in girlfriend (PW2) with whom she has a healthy sexual relationship.

[17] PW2 is the plaintiff's live-in girlfriend and her sex partner. PW2 testified that the plaintiff was able to perform sexual intercourse as a man and that they both have a normal sex life. PW2, however, accepted and conceded the plaintiff was unable to ejaculate (semen) and thus, will be unable to impregnate her. PW2 agreed and accepted the fact that she will not be able to conceive any child with the plaintiff due to the inability of the plaintiff to produce semen.

[18] PW3 is a Consultant Urologist who also examined the plaintiff after her SRS surgeries. According to PW3, from his physical examination and observation of the plaintiff, he found the plaintiff's appearance to be that of a male, who spoke with a male voice. The plaintiff has no breasts and vaginal opening. She has a reconstructed penis with two scrotal pouches. The penis is functional for voiding and sexual intercourse. The penis feels hard due to the silicone implant. The plaintiff can void (urinate) as a male (whilst standing) and that she was able to have sexual intercourse. PW3, however, confirmed that the plaintiff will not be able to ejaculate nor produce sperm/semen. PW3 opined that the SRS undergone by the plaintiff was successful and that the plaintiff can be considered a male from the urological perspective. (PW3 had prepared his specialist report as per encl. 23 – ikatan dokumen dipersetujui [2] pp. 23-27).

[19] PW4 (Dr Barathi) is a Consultant Psychiatrist. SD4 interviewed the plaintiff, the plaintiff's mother and her partner (PW2) after her SRS. Based on her interviews and examination, she opined that the plaintiff suffered from GD, a medical condition recognised by the WHO, as per the "Diagnostic and Statistical Manual of Mental Disorder (5th edn) (DSM-V).

[20] According to PW4, GD is an irreversible condition, and SRS is a recognised medical procedure to tackle GD. PW4 concluded that the plaintiff has fulfilled the criteria of the DSM-V which made her suited to perform the SRS. Apart from relying on the interviews abovesaid and the medical reports made available to her, PW4 also referred to published medical journals and articles in arriving at her conclusion. PW4 opined that the applicant fulfilled the criteria for Gender Dysphoria and concurred with the finding of Dr Kenneth Koh and Dr Wong Kok Kien (PW4's specialist report is as per encl. 23 - ikatan dokumen dipersetujui [2] pp. 1 to 22).

The Defendant's Case

[21] The defendant called the following six witnesses:

(i) DW1 - Abu Bakar bin Mohamed Tahir (Penolong Pengarah, JPN);

(ii) DW2 - Dr Ahmad Rostam bin Md Zin (Psychiatrist);

(iii) DW3 - Dr Siti Maisarah Ahmad (Consultant - Clinical O&G);

(iv) DW4 - Dr Noor Ashani Md Yusoff (Consultant Urologist);

(v) DW5 - Dr Roziana Ariffin (Consultant Cytogeneticist); and

(vi) DW6 - Prof Dato Dr Zukifli Md Zainuddin (Consultant Urologist).

[22] DW1 admitted receiving the letter dated 19 August 2013 from the plaintiff applying for a new NRIC to identify her as male or alternatively, to amend the particulars in her current NRIC pertaining to her gender including her name. DW1 admitted rejecting the said application on 29 August 2013 as the plaintiff had failed to obtain any such order from the court.

[23] Further, added DW1, there was no error nor mistake to all the information in the plaintiff's BC and NRIC particularly, the one concerning her gender. All the particulars in her BC and NRIC are provided by her parents to the defendant as in "Borang JPN KP.01". Also, according to DW1, on 8 January 2002 the plaintiff applied for a replacement NRIC from the defendant where, she again declared her gender as female. Thus, based on her own declaration, there was no error nor mistake regarding her gender as female in her current NRIC, to empower the defendant to amend/correct her NRIC.

[24] The plaintiff was also examined by the defendant's own medical and psychiatric experts from the "Bahagian Obstetrik & Ginekologi, Urologi dan Psikiatri" (DW2-DW6). Having examined the plaintiff, the defendant's experts are of the view that the plaintiff failed to fulfil all the legal and biological conditions/criteria of a male, notwithstanding the SRS performed on the plaintiff.

A **Issues For Determination**

[25] As per the statement of agreed issues, the core issues for determination by the court are:

(i) whether the plaintiff's claim is caught by *res judicata* and a multiplicity
B of action?

(ii) whether the plaintiff is to be treated as a "male" under the law?

(iii) whether the plaintiff's application to change the status of her gender in her NRIC from "female" to "male" ought to be allowed?

C **Submissions**

Issue (i) – Whether Plaintiff's Claim Is Res Judicata And A Duplicity Of Action?

The Plaintiff's Submission

[26] Learned counsel submitted that the plaintiff's claim is not caught by
D *res judicata* because the Kuala Lumpur High Court Originating Summons No. 25-203-10/2013 (OS 203) filed earlier by the plaintiff against the defendant was dismissed not on its merit by the court but purely on procedural grounds. According to counsel, the learned HCJ as per in the grounds of judgment (GOJ), found that the mode (judicial review) chosen by
E the plaintiff was wrong because on the facts and circumstances of the case, the correct mode should be by way of a writ action. The learned HCJ did not go into the factual matrix of OS 203. Thus, according to counsel, the defendant's point on *res judicata* is without merit and this suit ought to be determined on its merit.

F **[27]** As to duplicity of action, counsel submitted that as OS 203 had been disposed of by the court and currently leaving only this suit pending in court, the defendant's point on duplicity of action also cannot stand and is now academic.

The Defendant's Submission
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[28] The learned Senior Federal Counsel (SFC) for the defendant contrarily, submitted that the plaintiff claim herein is caught by *res judicata* because the reliefs sought in this suit herein are similar and the same to those in her earlier action/application (OS 203), which had been determined and
H disposed of by the High Court, the COA and the FC. Learned SFC, referred to the GOJ of the learned HCJ for OS 203, *ie*, *Fau En Ji v. Ketua Pengarah Jabatan Pendaftaran Negara* [2015] 1 CLJ 803, per Zaleha Yusof J.

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[29] Learned SFC added that at p. 809 of her GOJ, the learned HCJ had stated that the plaintiff should have filed a writ rather than a judicial review application, the plaintiff failed to take heed and instead proceeded to appeal to the COA and thereafter to the FC. Only after she failed before the FC did she file this writ hinged on the same facts and prayers, asking for the same and similar reliefs, which learned SFC submitted, tantamount to a duplicity of action and an abuse of process of the court.

Decision And Findings Of This Court For Issue (i)

Whether Plaintiff's Claim Is *Res Judicata* And A Duplicity Of Action?

[30] As to the applicable law, the Courts of Judicature Act 1964 para. 11 of the Schedule empowers the court to dismiss or stay proceedings where the matter in question is *res judicata* between the parties, or by reason of multiplicity of proceedings. The law on *res judicata* is settled and trite as decided amongst others, in the following case authorities:

(i) *Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors* [1996] 3 CLJ 695; [1996] 3 MLJ 259, p. 275;

(ii) *Penang Port Commission v. Kanawagi Seperumaniam* [2009] 1 CLJ 169; [2008] 6 MLJ 686, p. 693;

(iii) *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783;

(iv) *Syarikat Sebati Sdn Bhd v. Pengarah Jabatan Perhutanan & Anor* [2019] 3 CLJ 157;

(v) *Scott & English (M) Sdn Bhd v. Yung Chen Wood Industries Sdn Bhd* [2018] 6 CLJ 271; and

(vi) *Pilecon Engineering Bhd v. Malayan Banking Bhd & Ors* [2011] CLJU 1492; [2011] 1 LNS 1492; [2012] 3 MLJ 100.

[31] After having perused the plaintiff's pleadings, particularly the reliefs prayed for, it is quite apparent to me that what was claimed and prayed for by the plaintiff in this suit, are essentially the same and identical in nature to those in OS 203. I find the chart submitted by the learned SFC during submission of much assistance. The said chart is reproduced below for a clearer picture:

The Present Suit	Judicial Review (OS 203)
Facts: *The Plaintiff, who born a female on th21.10.2019. Throughout her childhood, The Plaintiff suffered from a symptom of a medical condition known as "Gender Identity Disorder" or Gender Dysphoria ["GDT"].* *Sometimes in 2009-2010, the Plaintiff sought for treatment from a medical professional known as Dr. Edward Chan of Optimum well-being Laboratories who later on issued a letter dated 18.05.2010 stated the recommendation for the Plaintiff to undergo sex reassignment surgery at Yanhee International Hospital in Bangkok, Thailand.* *The Plaintiff went to Vanhee International Hospital and she was examined by two psychiatrists. One of them, Dr. Ajchara Roumcharoenkiat, came to the same and she was suitable for the sex reassignment surgery.* *The Plaintiff went through various stages of sugery that were conducted by Dr Thawatchai Boopadhanapong and Dr. Amnat Techowanich (Parat 7 Statement of Claim) For the fin al stage of the surgery, which involved the reconstruction of all male organ structures, Dr Sukit Warathamrong had involved. [Para 10 Statement of Claim].* *Upon completion of her surgery, she went for further medical check-up with four (4) medical professionals practising in Malaysia, i.e:*	*Facts:* *The Plaintiff, who was born a female on 21.10.1989, had undergone some surgical procedures at the Yanhee International Hospital, Thailand between the year 2011 to 2012 for the purpose of changing her sex from female to male.* *At the Yanhee Hospital, the Plaintiff was treated by the following medical doctors and surgeons:* *(i) Dr. Thawatchai Boonpadhanapon, a plastic surgeon;* *(ii) Dr. Amnat Techowanich, a surgeon from the O8-GVN department;* *(iii) Dr. Ajchara Roumcharoenkiat, a psychiatrist; and* *(iv) Dr. Sukit Worathamrong, a certified plastic and reconstructive surgeon.* *Upon completion of the surgical procedures in Thailand, the Plaintiff went for further medical check–up with three (3) medical professionals practising in Malaysia i.e.* *(i) Dr. Wong Kok Kien, a Consultant Obstetrician and Gynaecologist from Gleneagles Hospital Kuala Lumpur;*

The Present Suit	Judicial Review (OS 203)
(i) Dr. Wong Kok Kien, a Consultant Obstetrician and Gynaecologist from Gleneagles Hospital Kuala Lumpur; (ii) Dr. Kenneth Koh Beng Hock, a Consultant Urologist from Pantai Hospital Kuala Lumpur; and (iii) Dr. Bharathi S. Vengadasalam, a Consultant Psychiatrist from Pantai Hospital Kuala Lumpur; and (iv) Dr. Selvalingam Sothilingam, Consultant Urologist from Pantai Hospital Kuala Lumpur [not stated in the Statement of Claim]. On the 19.08.2013, the Plaintiff made an Application to the Defendant for Change of Name and Gender and enclosing the medical reports from the Thai surgeons and he Malaysian doctors as supporting documents. By a letter dated 2.09.213, the Defendant informed the Plaintiff that the Application for Change of Name and Gender was rejected and that the rejection was based on "Arahan Jabatan Pendaftaran Negara Bil. 9/2007" dated 21.08.207 which states that the Defendant must produce a Court Order declaring the gender of a person before the Defendant can change the gender detail in the NRIC. Aggrieved, the Plaintiff filed this present Civil Suit.	(ii) Dr. Kenneth Koh Beng Hock, a Consultant Urologist from Pantai Hospital Kuala Lumpur; and (iii) Dr. Bharathi S. Vengadasalam, a Consultant Psychiatrist from Pantai Hospital Kuala Lumpur. On the 19.08.2013, the Plaintiff made an Application to the Defendant for Change of Name and Gender and enclosing the medical reports from the Thai surgeons and the three (3) Malaysia doctors as supporting documents. By a letter dated 2.09.2013, the Defendant informed the Plaintiff that the Application for Change of Name and gender was rejected and that the rejection was based on the decision made by the Panel Pindaan Butiran Kad Pengenalan on 29.08.2013. Aggrieved, the Plaintiff filed the Judicial Review Application.

[32] It is pertinent to note that the plaintiff did not take issue to the abovesaid chart and its content.

[33] To answer issue (i), it is also of assistance to look at the reliefs sought for in this suit and OS 203. For this suit, the reliefs prayed for are:

(i) a declaration that the plaintiff is legally a male;

(ii) an order of *mandamus* that the defendant makes an amendment to the plaintiff's name in the National Registration Indentity Card Number (NRIC) to "Kelven Fau";

(iii) an order of *mandamus* that the defendant makes a necessary amendment to the details of the plaintiff's gender from "female" to "male" including to change the last digit in the plaintiff's NRIC from "an even number" to "an odd number" for the purpose of identifying the plaintiff as a male; and

(iv) no order as to costs.

[34] For OS 203, the plaintiff asked for the following reliefs:

(i) declaration that the plaintiff is legally a male;

(ii) an order of *certiorari* to quash the decision made by the defendant dated 2 September 2013;

(iii) an order of *mandamus* that the defendant amends the plaintiff's name from "Fau En Ji" to "Kelven Fau"; and

(iv) an order of *mandamus* that the defendant to amend the details of the plaintiff's gender from "female" to "male" and to change the last digit in the plaintiff's identification number from "an even number" to "an odd number".

[35] Based on the abovesaid, learned SFC submitted that the plaintiff has filed two actions in court which are based on the same facts and had prayed for the same/identical reliefs, one of which (OS 203) had been duly considered, determined and disposed of by the court on merit.

[36] If what was submitted by learned SFC aforesaid is true, then it goes without saying that the present suit can be dismissed on the ground of *res judicata* pursuant to the Courts of Judicature Act 1964 para. 11 of the Schedule. In my view, to determine the issue, it is essential to revisit the grounds of judgment for OS 203 as reported in *Fau En Ji v. Ketua Pengarah Jabatan Pendaftaran Negara* (*supra*), per Zaleha Yusof J. The relevant parts of the GOJ are as follows:

JUDGMENT

Zaleha Yusof J:

Issue:

[6] Whether the respondent had acted reasonably, legally and rationally, without procedural impropriety and *mala fide*; in rejecting the applicant's application for change of name and gender.

Decision:

[8] I have scrutinized medical reports submitted by the applicant as shown in encl 3. The relevant ones are found in exhibit A-5, A-6, A-7, A-8, A-9 and A11. Exhibit A-5 was signed by Dr Thawatchai Boonpadhanapong, Dr Amnat Techowanich and Dr Ajchara Roumcharoenkiat. It merely states that mastectomy to remove breasts and hysterectomy to remove the applicant's uterus were done. This only covers the gonodal factor of a female.

[9] Exhibit A-6 is by Dr Sukit Worathamrong. He confirmed that all female sex organs of the applicant, had been removed (removal of gonodal factor of a female) and that urethra, penis and all male sex organs structures had been reconstructed (gonodal male factor). With that he concluded that the applicant could now "be classified as male identity", and expect the applicant "to have a better lifestyle with physically and psychologically".

[10] Exhibit A-7 is a letter by Dr Wong Kok Kie. He noted the evidence of removal of female organ and of the presence of a well constructed penis and scrotum. This covers the male gonodal factors. Exhibit A-8 is a short report by Dr Kenneth Koh who found the applicant to be on male hormone replacement therapy and had a deep voice, prominent larynx and male distribution of body hair. This only covers the male gonodal factors.

[11] Exhibit A-9 by Dr Bharathi S Vengadasalam merely confirms that the applicant was receiving male hormone and upon physical examination found the applicant to have male character and male organ. This covers the male gonodal factors. Exhibit A-11 is also by Dr Bharathi S Vengadasalam. He opined that the applicant fulfilled the criteria for Gender Dysphoria and concurred with the finding of Dr Kenneth Koh and Dr Wong Kok Kien.

[12] Based on the above medical reports, I totally agree with the respondent's argument that:

a. None of the medical officers gave evidence pertaining to the chromosal factor;

b. None of the medical officers gave evidence pertaining to the genital factor which involves internal sex organs and functions,

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c. None of the medical officer gave evidence pertaining to what can be defined as gender as a female and as a male.

d. None of the medical officers gave evidence pertaining to what are the characteristic of a male and a female (generally); and

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e. None of the medical officers gave evidence pertaining to whether sex reassignment surgery changes a person's gender to warrant a change of the gender description in that person's identity card, based on the requirements laid out in case law.

[13] Learned counsel for the applicant has argued that there is a clear departure from *Corbett* (*supra*) and *Bellinger* (*supra*) in that the Court of

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Appeal, in *Kristie Chan* (*supra*) was prepared to consider and take into account the psychological factor (in additional to the three (3) biological factors) in determining the gender of the applicant. With due respect, the *Corbett* (*supra*) which was followed by *Bellinger* (*supra*) did not confine only to the three (3) biological factors. As Ormrod J in *Corbett* (*supra*) had stated:

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... there are at least, four criteria for assessing the sexual condition of an individual. These are:

i. Chromosomal factors;

ii. Gonodal factors (*ie*, presence or absence of testes or ovaries);

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iii. Genital factors (including internal sex organs); and

iv. Psychological factors.

Hence, I opine, psychological factor alone or gonodal factors are insufficient to assess the applicant's sexual condition.

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[15] From the cause papers before me, I am satisfied that the applicant has failed to comply with the test as stipulated by the Court of Appeal in *Kristie Chan* (*supra*).

[37] Even though it was stated at para. 6 of the GOJ abovesaid that it is a question relating to judicial review, for the court to see whether the

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defendant had acted reasonably, legally and rationally, without procedural impropriety and *mala fide* when rejecting the plaintiff's application, it is apparent that Her Ladyship had dealt with merits of the application by going into in depth the factual matrix of the case. Thus, having had the benefit of thoroughly perusing the GOJ aforesaid, I am not persuaded by the plaintiff's

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counsel submission that OS 203 was dismissed purely on technical/ procedural ground, *ie*, due to a wrong mode taken by the plaintiff.

[38] For our present suit, the plaintiff relied *inter alia*, on the testimonies and medical reports by PW3 (Dr Selvalingam) and PW4 (Dr Barathi) to support her claim. The plaintiff also relied on the following reports:

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(i) report by Dr Thawatchai Boonphanaphong, Dr Amnat Technowanich and Dr Ajchara Roumcharoenkian dated 10 June 2011;

(ii) report by Dr Sukit Worathamrong 1 February 2013;

(iii) report by Dr Wong Kok Kien dated 14 March 2013;

(iv) report by Dr Kenneth Koh dated 26 March 2013; and

(v) report by Dr Edward Chan dated 18 May 2013.

[39] It is apparent in OS 203, the learned HCJ had scrutinised and considered thoroughly the medical reports of the plaintiff's experts abovementioned, including the facts deposed and adduced *via* the affidavits of the plaintiff as manifested in paras. 8, 9, 10 and 11 of the GOJ.

[40] Save for PW3 who did not feature in OS 203, all the aforesaid reports were appraised and duly considered by the HCJ in deciding/ruling OS 203 as per at paras. 8, 9, 10 and 11 of the GOJ. Hence, in my considered view, this suit which is premised on the same facts and evidence, which had been considered and determined by the court previously, is caught by *res judicata*, for which it can be dismissed pursuant para. 11 of the Schedule to the Courts of Judicature Act 1964.

[41] To wrap up this point on *res judicata*, it would suffice to see what our apex court had to say in *Syarikat Sebati Sdn Bhd v. Pengarah Jabatan Hutan & Anor* [2019] 3 CLJ 157 where it was held as follows:

> [34] Firstly, on the issue of *res judicata*, it is necessary to reiterate the elements which constitute *res judicata*. For this purpose we find the book *Spencer Bower and Turner Res Judicata* (3rd Ed, 1996) particularly useful. There the learned authors sets out at p. 10, para 19 what involved in the burden of showing *res judicata* which consist of six matters:
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> (i) the decision was judicial in the relevant sense;
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> (ii) it was in fact pronounced;
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> (iii) the tribunal had jurisdiction over the parties and the subject matters;
>
> (iv) the decision was – (a) final, and (b) on the merits;
>
> (v) it determined the same questions as that raised in the letter question; and
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> (vi) the parties on the latter were either parties in the earlier litigation or their privies, or the earlier decision was in rem.

[42] I find that the facts and circumstances of our case fit squarely into the elements above mentioned. Thus, based on the aforesaid, the plaintiff claim herewith is dismissed on the ground of *res judicata*.

[43] Next, I shall deal with issue (ii).

Issue (ii) – Whether The Plaintiff Is To Be Treated As A "Male" Under The Law?

The Law

[44] At present, the stand/view of the courts pertaining to gender re-assignment is somewhat split between two schools, the traditional and progressive as termed by James Foong J in *J-G v. Ketua Pengarah Jabatan Pendaftaran Negara* [2005] 4 CLJ 710. The 'progressive', as the term denotes recognises gender re-assignment, as against the 'traditionalist' which had refused to do so. Amongst the cases referred to by the parties where the courts had recognised gender re-assignment/sex-change are:

(i) *J-G v. Ketua Pengarah Jabatan Pendaftaran Negara* (*supra*);

(ii) *Tan Pooi Yee v. Ketua Pengarah Jabatan Pendaftaran Negara* [2016] 8 CLJ 427; and

(iii) *Attorney-General for the Commonwealth v. Kevin & Others* [2003] Fam CA 94 (*Re Kevin*).

[45] It bears mention that *Tan Pooi Yee v. Ketua Pengarah Jabatan Pendaftaran Negara* (*supra*) was subsequently overturned by the Court of Appeal.

[46] Whilst, in the following cases, the courts had refused to recognise gender re-assignment:

(i) *Corbett v. Corbett* [1970] 2 All ER 33;

(ii) *Bellinger v. Bellinger* [2003] UKHL 21; House of Lords

(iii) *Wong Chiou Yong v. Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara* [2005] 1 CLJ 622;

(iv) *Fau En Ji v. Ketua Pengarah Jabatan Pendaftaran Negara* [2015] 1 CLJ 803; and

(v) *Kristie Chan v. Ketua Pengarah Jabatan Pendaftaran Negara* [2013] 4 CLJ 627.

The Plaintiff's Submission

[47] Learned counsel submitted that GD is a recognised medical condition and is irreversible. SRS is recognised as a procedure to treat the said condition and that it is now possible to change a person's gender to be in congruent with the person's own desired gender. Counsel contended that the plaintiff suffered from GD prior to undergoing her SRS as supported by the evidence/testimonies of PW4 and PW3, the plaintiff's experts. Counsel

maintained that their testimonies must be given credence and much greater weight as compared to the defendant's witnesses. PW4 for instance, is more thorough and in depth in her interview and examination of the plaintiff, as compared to the defendant's witnesses.

[48] Counsel added that, for someone who has successfully undergone SRS, the plaintiff is entitled to be recognised as a male from the medical and legal perspective, now that she has been socially accepted and acknowledged as a male by her family, peers and doctors. Counsel submitted that there is a clear consensus amongst the medical experts from both sides that a person is recognised and treated as having acquired his/her desired gender if he/she has successfully completed the SRS.

[49] Counsel referred to the Australian Court of Appeal case of *Attorney-General for the Commonwealth v. Kevin & Others* (*supra*) (*Re Kevin*) and our High Court case of *J-G v. Pengarah Jabatan Pendaftaran Negara* (*supra*). Counsel invited the court to follow them for being more just and reasonable and in sync with current trend and medical development. As earlier noted these are two cases whereby the courts recognised the new gender of the plaintiff/applicant pursuant to SRS.

[50] As to the case of *Corbett* (*supra*) cited and referred to by the defendant, counsel submitted that the law propounded is now archaic and outdated. Instead, counsel urged this court to accept the dissenting judgment/decision in *Bellinger* (*supra*).

The Defendant's Submission

[51] Foremost, learned SFC submitted, the court needs to fall back to the case of *Kristie Chan* (*supra*). In applying the principle propounded in *Corbertt* (*supra*) and Bellinger (*supra*), the Court of Appeal concluded that gender involves consideration of chromosomal, gonadal, genital and psychological factors.

[52] Learned SFC did not dispute that GD is a medical condition and that SRS is a medical procedure available to treat the said condition. However, learned SFC disagreed that GD is irreversible as there are reported cases of reversion by gender/sex re-assigned persons, who had a change of mind post SRS.

[53] Learned SFC submitted that although the plaintiff had undergone a successful SRS, she failed to prove that all the factors and criteria as mentioned in *Kristie Chan* (*supra*) abovesaid have been fulfilled. Learned SFC contended that the plaintiff's medical reports from YIH Thailand only cover the female gonadal factor. As for the report by Dr Wong Kok Kien on the constructed male sexual organs (penis and scrotum), learned SFC averred

that it only covers the male gonadal factor. Likewise, the report by Dr Kenneth Koh Beng Hock, on the plaintiff's hormone replacement therapy, having a deep voice, prominent larynx and male distribution of body hairs, it also only covers the male gonodal factor. Similarly, the evidence by Dr Barathi (PW4) who concurred with the finding of Dr Kenneth Koh and Dr Wong Kok Kien, it covers only the male gonadal factors.

[54] As to the plaintiff's counsel submission that the evidence/testimonies of PW3 and PW4 are more reliable and cogent as against the defendant's, the learned SFC contrarily submitted that PW4 is shaky and unreliable, as compared to the defendant's witnesses.

[55] SFC concluded that even if the plaintiff had shown that the SRS performed on her was successful and had fulfilled the gonadal and psychological treatment requirement, the plaintiff failed to prove the chromosomal factor. As such, SFC submitted that despite the plaintiff's current physical appearance, sexual relationship with her partner and the acceptance by her peers and her medical doctors, the plaintiff failed to prove that she is medically and biologically a male. Learned SFC relied on the views of the defendant's experts (DW2-DW6). DW3-DW6 testified that the gender of a person is conclusively determined by one's chromosome and not one's appearance or social acceptance.

[56] Learned SFC relied amongst others on the local High Court cases of *Wong Chiou Yong v. JPN* (*supra*) and *Fau En Ji v. Ketua Pengarah JPN* (*supra*) and the English cases of *Corbett* (*supra*) and *Bellinger* (*supra*). Counsel urged the court to refer to *Kristie Chan* (*supra*) for the criteria/factors in determining the plaintiff's gender.

Decision Of The Court – Issues (ii)

[57] Foremost, it is agreed by both sides that GD is a recognised medical condition and that SRS is one of the legitimate medical procedures to treat it. It is also not in dispute that the plaintiff herein suffered from GD and had underwent SRS in Thailand.

[58] Learned counsel submitted that the plaintiff had fulfilled all the criteria as laid down in *Kristie Chan* (*supra*) and thus, entitled to be treated and recognised as being a male from the medical perspective. The SFC expectedly submitted and contended otherwise. The Court of Appeal in *Kristie Chan* (*supra*) followed the cases of *Bellinger* (*supra*) and *Corbett* (*supra*) and held that gender involves consideration of chromosomal, gonodal, genital and psychiatric factors. Thus, the question is whether the plaintiff in our case herein had fulfilled the criteria aforesaid to be entitled to the declaratory reliefs prayed for?

Psychiatric/Psychological Factor

[59] There is no dispute amongst the expert witnesses that there should be at least a psychiatrist to verify and confirm the medical condition suffered by the plaintiff before recommendation may be made for him to undergo SRS. Counsel submitted that this requirement had been satisfied by the plaintiff as she was examined by one Dr Ajchara Roumcharoenkiat, a psychiatrist from the YIH. The plaintiff also referred on the medical report dated 10 June 20211, signed by three medical doctors from YIH which stated that the plaintiff was examined by the psychiatrist on 15 February 2011 and on the letter dated 2 January 2013, also from YIH which also confirmed that the plaintiff was examined by two psychiatrists on 16 February 2011. The two letters supported the recommendation for the plaintiff to proceed with SRS. Based on those evidence aforesaid, I find on a balance of probability, the psychiatric factor/criteria had been proved by the plaintiff.

Gonodal Factor

[60] Learned counsel submitted the gonodal factor/criteria (both male and female) had been proved by the plaintiff *via* the evidence of PW3 amongst others. PW3 confirmed that having physically examined the plaintiff, he noticed the plaintiff having a male organ (constructed penis). Based on that, amongst others, PW3 considered the plaintiff gender to be a male.

[61] The defendant did not dispute the existence of the constructed penis. Anyway, an interesting unchallenged fact adduced through PW3 pertaining to the characteristic of the plaintiff's constructed penis wherein. PW3 testified that he found the plaintiff's constructed penis to be in a continuous and perpetual state of erection, due to, silicone implant. To me it is most unlike a normal/natural penis which would only naturally/normally erect on being sexually aroused. Adding to that, the plaintiff's constructed penis and scrotum were unable to produce and to ejaculate semen. Thus, in that circumstances, can it be said that a penis of a male person had been constructed? I have my reservation but to be fair to the plaintiff, I am not a urologist nor medical expert in that field.

[62] Be that as it may, to prove the gonodal factor, counsel also relied on other evidence, *viz*, the medical report of Dr Kenneth Koh, who found the plaintiff to be on male hormone treatment, to have a deep voice, a prominent larynx and distribution of body hair. Additionally, the evidence of Dr Barathi (PW4) who confirmed that the plaintiff was receiving male hormone and having male character and male organ. Hence, even if I am to conclude that the constructed penis is not a penis as defined medically or biologically, based on the abovesaid, in my view, the plaintiff has, on a balance of probability, proved the gonodal factor.

A **Chromosomal Factor**

[63] It is not disputed that despite the "successful" SRS, the plaintiff's chromosome remained unchanged, *ie,* that of a female. In fact, it is noteworthy the plaintiff's medical expert (PW3 and PW4) also agreed that even though the plaintiff now has a constructed male sex organ (penis) and
B was able to perfom sexual intercourse, the plaintiff's chromosome remained as before the SRS, *ie*, the chromosome of a female. None of the plaintiff's medical experts gave evidence pertaining to the chromosomal factor. The closest would be PW4 who said that the definition of gender is not just based on the biology of the XX chromosome and XY chromosome but a mix of
C factors of biology, psychology and social aspects.

[64] The plaintiff's counsel invited me to follow the decision in *J-G v. Pengarah Jabatan Pendaftaran Negara* (*supra*) wherein James Foong J in allowing the plaintiff's claim and in refusing to follow *Corbett* (*supra*) on the need to prove the chromosomal factor states the following:

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> ... And in the end, like in most of these cases favouring *Corbett v. Corbett* (*supra*) test, the garnet is thrown back at legislative body to make the necessary laws for the court to follow if Parliament so wishes. But then again, the legislative body would depend on the medical opinions. And here, in this instant case, the medical men have spoken: the plaintiff is
> E female. They have considered the sex change of the plaintiff as well as her psychological aspect. She feels like a woman, lives like one, behaves as one, has her physical body attuned to one, and most important of all, her psychological thinking is that a woman.

[65] The case decision abovesaid was followed by His Lordship S Nantha
F Balan J (as His Lordship then was) in *Tan Pooi Yee v. Ketua Pengarah Jabatan Pendaftaran Negara* (*supra*) whereby His Lordship decided to depart from the cases decided earlier on the requirement of "chromosomal factor" and stated that:

> ... In my view, the chromosomal requirement is archaic and should be
> G discarded because scientifically it is impossible for a biological male to have female chromosomes and vice versa. The male XY and female XX chromosome will remain static throughout the individual's natural life. Hence it is naive to suggest that an applicant has to show that he or she has the chromosome of the re-assigned sex. It plainly means that to insist of the chromosomal requirement is to ask for the impossible and I think
> H that nothing can be more unjust than that.
>
> To my mind, the better view with regards to the chromosomal issue is that which has been encapsulated in the approach that was taken by the Family Court in Australia in *Attorney-General for the Commonwealth v. Kevin & Others* [2003] Fam CA 94 where at para 295 of the judgment, the court
> I emphasised the importance of abandoning the chromosomal factor and highlighting the imperative need to view the matter from the physiological and physiological perspective.

[66] As earlier mentioned *Tan Pooi Yee* (*supra*) was subsequently overruled by the Court of Appeal which endorsed the ruling/decision in *Corbett* (*supra*).

[67] The defendant's counsel also invited this court to follow the case of *Re Kevin* (*supra*), which counsel submitted was just and in keeping with the current social and medical development. Counsel invited this court to steer clear of the cases of *Corbett* (*supra*) and *Bellinger* (*supra*) which was not followed by *Re Kevin* (*supra*). Having read through *Re Kevin* (*supra*), it seems to me, the two English cases abovesaid were not followed because to do so would be inconsistent with Australian laws. At para. 326 of the judgment of the court, where it was held as follows:

> 326. ... in my view there are overwhelming reasons why the application should be granted. I see no basis in legal principle or policy why Australian law should follow the decision on Corbett. To do so would, I think, create indefensible inconsistencies between Australian marriage law and other Australian laws ...

[68] However, in our present case, learned counsel failed to show in what way the decision and principle in *Corbett* (*supra*) which was accepted by our court in amongst others, *Kristie Chan* (*supra*) is at loggerheads with our existing laws.

[69] Therefore, having considered and appraised the abovesaid, I am not persuaded by PW4's contention that gender is not just based on the biology of the XX chromosome and XY chromosome but a mix of factors of biology, psychology and social aspects. Bearing in mind, chromosomal factor is one of the crucial and determining factors as held in *Corbett* (*supra*), *Bellinger* (*supra*) and *Kristie Chan* (*supra*), I find that the plaintiff has failed to showed to the court that chromosomal factor/criterium has been fulfilled as required. I am in concurrence with the learned SFC that the plaintiff has failed to comply with the test as stipulated by the Court of Appeal in *Kristie Chan* (*supra*) which endorsed the decision in *Bellinger* (*supra*) and *Corbett* (*supra*). Predicated on that, I find that the plaintiff failed to prove her claim.

[70] Next, I move on to the last issue, issue (iii).

Issue (iii) – Whether The Plaintiff's Application To Correct/Amend Her NRIC In Particular, The Status Of Her Gender From "Female" To "Male" Ought To Be Allowed?

[71] Issue (iii) pertains to reliefs (b) and (c) of the plaintiff's statement of claim, *ie*, to correct/amend the particulars in her NRIC pertaining to the status of her gender, the last four numerical digits and her name.

[72] In my view, that reliefs (b) and (c) is somewhat dependant on the outcome of the plaintiff's claim for relief (a). As earlier explained, the claim for relief (a) was dismissed/disallowed by me. Following the dismissal of

relief (a), I am of the considered view that the claim for reliefs (b) and (c) of the SOC now has no legs to stand on and as such must also fall and be dismissed. On that score alone, the plaintiff's claim for reliefs (b) and (c) are dismissed. Be that as it may, I shall now proceed to determine issue (iii) on its merit.

[73] All matters concerning the documents for registration of identity (certificate of birth and NRIC) of a person is governed under the provision of the National Registration Act 1959 (Revised 1972) (Act 299) and the Births and Deaths Registration Act 1957 (Act 299) and the regulations enacted thereunder. Any alteration, correction or amendment to the content in the NRIC can only be made under reg. 14 of the National Registration Regulations 1990/(PU(A) 472/1990). In my view, it is evident that s. 27(3) Act 299 excludes the reliefs sought for by the plaintiff herein. In *Wong Chiou Yong v. Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara* (*supra*) which involved a similar situation, it was held that there was no error/mistake pertaining to the details in the plaintiff's NRIC to empower the court to grant the reliefs sought for. VT Singham J at p. 636, in dismissing the claim by Wong (the applicant) to correct/amend his gender/sex status in his NRIC from male to female, made following findings:

> (1) *The relevant legislation that the birth register may be amended only if an error was made in the initial registering of the birth is s. 27 of the Act 299/1957*. The other relevant legislation is s. 6(2) of Act 781/1959. *In the present case, there was no error in the sex of the applicant as initially entered in the birth certificates and thereafter the identification card. There was no medical examination that that there was a mistake in fact or substance at the time of the registration of birth*. In fact, the biological change on the applicant was by medical or surgical means and this was supported by the applicant's own evidence and material produced before the court.
>
> [1] *A person who has undergone a sex change operation cannot be regarded as belonging to the sex for which reassignment surgery was undertaken. Further, the words "man" and "female" in the relevant documents do not include persons of reassigned sex and should not be contrary to the biological characteristics of the person when born*.
>
> [2] *The reassignment surgery did not affect the status of the applicant's true gender at the time of birth. Further, this court has no power to grant the application on the ground that there was gender reassignment surgery*. There was also no express legislation to re-register the gender of a transsexual or register a transsexual under the guise of any error or fact or substance in the register pursuant to s. 27(3) of Act 299 and s. 6(2) Act 78 1959. An entry in the register book too, is regarded as a record of fact at the time of birth and the birth certificate constitutes a document revealing not current identity but historical facts.

> [3] ... *The practice of the registrar general is to apply exclusively the biological criteria, chromosomal, gonadal, and genital sex as informed by the parents or guardian of the child. The fact that the later in life the person's "psychological sex" is at variance with its biological constituents cannot be considered to invoke s. 27(3) of Act 299/1957 so as to imply that the initial entry was a factual error. A change in the initial entry will be contemplated in the following circumstances, namely, in cases of clerical error, error of fact or substance, wrong identification of the apparent and genital sex of the child at the time of birth; where the biological criteria are not congruent".*
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> (emphasis added)

[74] Being a decision of a court of coordinate jurisdiction, the said decision is not binding but of persuasive value to me. Having perused the said judgment, I cannot find any reason to disagree with the said ruling/decision. I am in concurrence with His Lordship's finding that correction/amendment to the NRIC can only be made upon proof that there occasioned a mistake/error in respect of the particulars at the time when such document was issued by the Registration Department.

[75] Similarly, in our case, there was no such mistake/error being committed by the defendant. The particulars relating to gender in her NRIC is correct at the time of issue. Noteworthy, the particulars in the NRIC, including relating to the plaintiff's gender were all given by the plaintiff's parent.

[76] Apart from the abovesaid decision, I am persuaded by the official records in the Hansard of House of Representatives dated 6 December 2004 which *inter alia*, recorded the following:

> maka keterangan jantina yang diberikan adalah berdasarkan kepada pengesahan permohonan atau pengawai perubatan ketika kanak- kanak tersebut dilahirkan. Percanggahan atau kesilapan mengenai jantina tidak mungkin berlaku dan walau bagaimanapun *Akta Pendaftaran Kelahiran dan Kematian membenarkan supaya pindaan dilakukan jika berlakunya kesilapan teknikal semasa pendaftaran dan kelahiran tersebut dilakukan.*
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> (emphasis added)

[77] As mentioned earlier, the plaintiff in our case, the application to correct/amend her NRIC was made after her SRS and not due to mistake/error in her birth certificate (BC) or to her NRIC. Thus, based on the abovesaid, I find that, on a balance of probability, the plaintiff failed to prove that she is entitled to reliefs (b) and (c). Thus, the plaintiff's claim for reliefs (b) and (c) are dismissed accordingly.

Decision And Findings Of The Court For Issue (iii)

[78] Having appraised the related facts I agreed with the submission by the learned SFC. I am of the view that, in the circumstances of this case the court is not empowered to overstretch its judicial power to change particulars pertaining to gender, name and the numerical digits of the NRIC.

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Overall Conclusion

[79] After having appraised the facts and circumstances as a whole, I find that the plaintiff may have fulfilled two of the criteria as stated in the WHO DSM-5 but failed prove the chromosomal element, an essential and conclusive element to prove a person's gender. Therefore, based on the position of the law as held in the cases of *Kristie Chan* (*supra*), *Bellinger* (*supra*) and *Corbett* (*supra*), on the reasons explained earlier on in this judgment, on the balance of probability, I find the plaintiff has failed to prove her claim. Hence, the plaintiff's claim against the defendant is dismissed with costs of RM10,000.

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